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IN THE

Supreme Court of the United States

No. 790 TERM, 1944

HARRY HOBERMAN,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associated Justices of the Supreme Court of the United States

Your petitioner, Harry Hoberman, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit (No. 8689, October 1944) entered November 15, 1944.

STATEMENT OF THE CASE

The defendant, a wholesale poultry dealer, was tried in the United States District Court for the Eastern District of Pennsylvania on two indictments. Indictment No. 11968, containing one count, charged him with conspiracy with a certain Simon Kagan to violate the maximum price

regulations as prohibited under the Emergency Price Control Act of 1942 (56 Stat. 28, 50 U. S. C. A. 904). The co-conspirator, Kagan, was not indicted. The other indictment (No. 11967), containing 76 counts, charged him with the substantive acts committed in the conspiracy with Kagan (i. e., the sales made as a result of the conspiracy), as well as totally independent offenses—sales made by the defendant to others in which Kagan was in no way involved.

Both indictments were consolidated for trial over the objections of the defendant. The case was tried twice, the first trial before His Honor Judge Bard resulting in a disagreement by the jury, and the second trial before His Honor Judge Dawkins (La.), specially sitting, resulting in a verdict of guilty on both indictments (with a few counts eliminated).

The co-conspirator, Kagan, was the only witness against the defendant on the conspiracy charge. He (Kagan) testified that he made the purchases of poultry from the defendant for others, had the bills made out for the ceiling prices and exacted additional "side money" from these purchasers which he turned over to the defendant. The purchasers from Kagan testified as to the "side money" they paid Kagan. There was only one separate witness who testified that he paid the defendant over the ceiling in direct sales to him by the defendant. The total overcharges in all the transactions did not exceed $500.00.

The defendant was sentenced by Judge Dawkins to imprisonment for a term of ninety days and to a fine of $1,000.00.

The Circuit Court of Appeals for the Third Circuit affirmed the judgment of the District Court in a per curiam decision without any further opinion or comment.

QUESTIONS INVOLVED

1. Where a defendant in one indictment is charged only with a conspiracy to commit a crime and in another indictment is charged with the actual commission of the crime involved in that conspiracy together with the commission of crimes totally unrelated to the conspiracy, can such two indictments be consolidated for the purposes of trial?

2. Can a defendant be tried on an indictment charging him with a conspiracy with single named and available co-conspirator who has not been indicted?

3. Can the declarations of an alleged co-conspirator be admitted against a defendant before the conspiracy is shown and before evidence is produced that the defendant was a party to such conspiracy?

4. Is a charge relating to character evidence proper which states that such evidence serves only to tip the scales when there is reasonable doubt?

REASONS FOR GRANTING THE WRIT

Your petitioner submits that the Circuit Court has decided the question herein involved in conflict with the applicable decisions of this court and in a way untenable and in conflict with weight of authority and has so far sanctioned the departure by the lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

The trial court permitted the consolidation of two in-

dictments, one containing counts in no way related to the other indictment and requiring different and unrelated proof. This is in violation of the Acts of Congress and the express decision of this court in *McElroy vs. United States*, 164 U. S. 76. It is unfair to the defendant and confusing to the jury and in fact did confuse the trial judge himself as is discussed more fully and at length in the Argument attached to this petition.

The defendant was charged with conspiracy with Simon Kagan. The defendant alone was indicted. Kagan was available and testified against the defendant. The decisions generally (cited in the Argument attached to this petition) hold that where only two persons are charged as conspirators, it results that, except in extreme cases, such as the death of one of the alleged conspirators or his absence from the jurisdiction, unless both can be legally convicted, either can be. To hold otherwise would not only be unfair and dangerous, but would lack sense.

The testimony of the alleged co-conspirator was admitted before proof was shown of the conspiracy and before evidence was adduced that the defendant was a party to such conspiracy. This is contrary to the decision of this court in *Stager vs. United States*, 233 U. S. 51 and other decisions cited in the attached Brief of Argument.

The trial judge charged that the evidence relating to the good character of the defendant serves only to tip the scales when there is reasonable doubt. This is erroneous and contrary to the decision of this court in *Eddington vs. United States*, 164 U. S. 361 and other decisions cited in the Brief of Argument.

Respectfully submitted,

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Attorney for Petitioner.